

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 JOSEPH SCHAEFER, CITY OF AURORA,
5 CITY OF WILSONVILLE,
6 1000 FRIENDS OF OREGON, and
7 FRIENDS OF FRENCH PRAIRIE,
8 *Petitioners*,

9
10 and

11
12 CLACKAMAS COUNTY,
13 *Intervenor-Petitioner*,

14
15 vs.

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17 OREGON AVIATION BOARD and
18 OREGON DEPARTMENT OF AVIATION,
19 *Respondents*,

20
21 and

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23 AURORA AIRPORT IMPROVEMENT
24 ASSOCIATION, BRUCE BENNETT,
25 WILSON CONSTRUCTION COMPANY, INC.,
26 TED MILLAR, TLM HOLDINGS, LLC,
27 ANTHONY ALAN HELBLING, and
28 WILSONVILLE CHAMBER OF COMMERCE,
29 *Intervenors-Respondents*.

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31 LUBA Nos. 2019-123/127/129/130

32
33 FINAL OPINION
34 AND ORDER

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36 Appeal on remand from the Court of Appeals.

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38 Joseph Schaefer represented themselves.

Sara Kendrick and Emily Gilchrist represented petitioner City of Aurora.

Amanda R. Guile-Hinman, Barbara A. Jacobson, and J. Ryan Adams represented petitioner City of Wilsonville.

Andrew Mulkey represented petitioners 1000 Friends of Oregon and Friends of French Prairie.

Stephen L. Madkour and Nathan K. Boderman represented intervenor-petitioner Clackamas County.

Lucinda D. Jackson, Rachel E. Bertoni, and Stacy C. Posegate represented respondents.

Wendie L. Kellington represented intervenors-respondents Aurora Airport Improvement Association, Bruce Bennett, Wilson Construction Company, Inc., Ted Millar, TLM Holdings, LLC, and Anthony Alan Helbling.

Eric S. Postma represented intervenor-respondent Wilsonville Chamber of Commerce.

RYAN, Board Member; ZAMUDIO, Board Chair; RUDD, Board Member, participated in the decision.

REMANDED 04/11/2022

28 You are entitled to judicial review of this Order. Judicial review is
29 governed by the provisions of ORS 197.850.

Opinion by Ryan.

2 NATURE OF THE DECISION

3 Petitioners appeal an October 31, 2019 decision of the Oregon Aviation
4 Board (OAB) adopting findings in support of a 2012 update to the Aurora State
5 Airport Master Plan.

6 DISPOSITION

7 In *Schaefer v. Oregon Aviation Board*, ___ Or LUBA ___ (LUBA Nos
8 2019-123/127/129/130, Dec 16, 2020), we dismissed petitioners' appeal of an
9 OAB decision adopting findings to support a 2012 revision to the Airport Master
10 Plan for the Aurora State Airport because we concluded that the challenged
11 decision was not a "land use decision" as defined in ORS 197.015(10)(a)(B),
12 which provides that "land use decision" includes "[a] final decision or
13 determination of a state agency * * * with respect to which the agency is required
14 to apply the goals." Petitioners appealed our decision to the Court of Appeals,
15 and the court reversed and remanded our decision. *Schaefer v. Oregon Aviation*
16 *Board*, 312 Or App 316, 495 P3d 1267, *adh'd to as modified on recons*, 313 Or
17 App 725, 492 P3d 782, *rev den*, 369 Or 69 (2021) (*Schaefer II*).¹

¹ Because the court’s decision in *Schaefer II* reversed and remanded our decision without instructions to resolve any jurisdictional question, we assume for purposes of this opinion that respondents were “required to apply the [statewide planning] goals” to the decision and that LUBA has jurisdiction over the decision pursuant to ORS 197.015(10)(a)(B).

1 **A. Missing Record Item**

2 In *Schaefer II*, one basis for reversing and remanding our decision was the

3 court’s conclusion that the record of the proceedings before LUBA must include

4 the “version of the master plan that [OAB] approved on October 27, 2011, along

5 with any other materials that [OAB] considered at that meeting.” *Id.* at 326, 345-

6 46. In an order dated February 8, 2022, we directed respondents to transmit and

7 serve a fifth supplemental record containing those items.

8 Respondents first filed a response that takes the position that respondents

9 “have previously submitted all materials relating to the [OAB’s] adoption of the

10 Aurora State Airport Master Plan which were found as part of a reasonable

11 investigative review of the [OAB’s] records from November 3, 2009 through

12 January 8, 2013.” Respondents’ Response to Order to Submit Fifth Supplemental

13 Record 2. In a second pleading responding to various objections and responses

14 from petitioners and intervenors-respondents Aurora Airport Improvement

15 Association, Bruce Bennett, Wilson Construction Company, Inc., Ted Millar,

16 TLM Holdings, LLC, and Anthony Alan Helbling (together, intervenors AAIA),

17 respondents reaffirmed that response and, in addition, stated that “the agency and

18 its counsel have reviewed all the records in Respondents’ possession, custody

19 and control relating to the October 27, 2011, decision and been unable to produce

20 the exact records placed before [OAB] on that date to any degree of certainty.”

21 Response to Petitioners’ Objections and Intervenor’s Response to Petitioners’

22 Response to Order to File Fifth Supplemental Record 4.

1 Based on those responses, we conclude that respondents have exercised
2 reasonable investigative effort to locate the missing records and have been unable
3 to do so. If respondents are unable to locate the missing items with reasonable
4 investigative effort, then there is no remedy we can order for purposes of
5 responding to the court's opinion. *Hal's Construction, Inc. v. Clackamas County*,
6 37 Or LUBA 1037, 1038 (2000); *Friends of Neabeack Hill v. City of Portland*,
7 29 Or LUBA 557, 557-58 (1995).

8 **B. Disposition**

9 Respondents request remand of the decision and state that they intend not
10 to adopt or address the challenged decision on remand but, rather, to begin a new
11 process for adopting a new update to the existing master plan. Intervenors AAIA
12 also request remand of the decision, although they have a different view than
13 respondents of what should occur on remand. Petitioner City of Wilsonville
14 disagrees with intervenors AAIA's proposed course of action on remand but, as
15 we understand it, also seeks remand of the decision. Petitioners Schaefer, City of
16 Aurora, 1000 Friends of Oregon, and Friends of French Prairie seek reversal of
17 the decision.² For the reasons explained below, we conclude that remand is the
18 appropriate remedy.

² According to petitioners Schaefer, City of Aurora, 1000 Friends of Oregon, and Friends of French Prairie, the decision is "prohibited as a matter of law" and "unconstitutional." OAR 661-010-0071(1)(b) - (c).

1 ORS 197.850(9)(a) provides that one basis for the court to reverse or
2 remand LUBA's decision is that the court finds “[t]he order to be unlawful in
3 substance or procedure, but error in procedure is not cause for reversal or remand
4 *unless the court finds that substantial rights of the petitioner were prejudiced*
5 *thereby[.]*” (Emphasis added.) One of the bases on which the court reversed and
6 remanded LUBA's decision was that LUBA's denial of petitioners' record
7 objection regarding the absence of the 2011 master plan from the record at LUBA
8 was unlawful in procedure. Therefore, under ORS 197.850(9)(a) that error in
9 procedure prejudiced the substantial rights of the petitioners. *Schaefer II* at 345-
10 46. Moreover, we have held in similar circumstances that, where LUBA cannot
11 perform its review function or resolve the assignments of error without an item,
12 remand is the appropriate remedy. *Andrews v. City of Prineville*, 28 Or LUBA
13 653, 661-62 (1995) (where the record was missing audio tapes that prevented
14 LUBA from determining whether the issues presented were preserved for appeal,
15 those inadequacies in the record made it impossible for LUBA to perform its
16 review function, and remand for further proceedings was the appropriate
17 remedy); *McCulloh v. City of Jacksonville*, 49 Or LUBA 345, 349 (2005)
18 (remand must occur when missing exhibits are necessary for LUBA to conduct
19 its review).³ Based on the disposition of the issue by the court and the prejudice

³ After remand, the challenged decision is ineffective. *Turner v. Jackson County*, 62 Or LUBA 199, 210 (2010), *aff'd*, 240 Or App 816, 249 P3d 564 (2011); *NWDA v. City of Portland*, 58 Or LUBA 533, 541-42, *aff'd*, 229 Or App

1 to petitioners without that item, we conclude that remand is the appropriate
2 remedy. We also conclude that ORS 197.835(11)(a) does not require us to
3 “decide all issues presented” in circumstances such as these, where the record is
4 not sufficient to allow review because it is missing an item that the court
5 concluded is necessary to resolve the appeal.⁴

6 The decision is remanded.

504, 213 P3d 590 (2009); *Western States v. Multnomah County*, 37 Or LUBA
835, 842-43 (2000).

⁴ ORS 197.835(11)(a) provides:

“Whenever the findings, order *and record* are sufficient to allow review, and to the extent possible consistent with the time requirements of ORS 197.830(14), the board shall decide all issues presented to it when reversing or remanding a land use decision described in subsections (2) to (9) of this section or limited land use decision described in ORS 197.828 and 197.195.” (Emphasis added.)